FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ET AL.,
Petitioners,

vs.

JOSEPH W. EVANS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS OSCAR MAYER & CO., ROBERT M. BOLZ, N. D. OTTENS, DONALD L. PAUL, PAUL F. GOULD.

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I.

Respondent and the Solicitor General each claim that a sixty day period of state deferral is too short to permit state authorities to play a meaningful role in resolving age discrimination claims and, therefore, it is illogical to construe filing with state authorities as mandatory (Resp. Br. 15-16; S. G. Br. 14-18).

Speculation about what each of the thirty-two local agencies enforcing laws against age discrimination may or may not be able to do in a sixty day period has no bearing on the question presented in this case.[1] What is important is that Congress

1. The Solicitor General concedes that "[s]ome complaints might be capable of resolution with 60 days", *e.g.*, "simple complaints or ones in which the alleged wrongdoer promptly admitted error" (S. G. Br. 17n.14). The Solicitor thus admits that construing Section 14(b) as a mandatory prerequisite will at a minimum keep these types of complaints out of the federal courts.

believed a minimum of sixty days to be an appropriate period of deferral. This period strikes a balance which allows states an opportunity to give meaningful consideration to the charge, yet it is short enough in duration so as to avoid undue delay in the processing of the claim.

Concern about the shortness of the sixty day period mistakenly assumes that a complainant must commence litigation as soon as the sixty day period has expired. This is simply not true. An individual needs only to commence his suit before the two year statute of limitations of the Age Discrimination in Employment Act ("ADEA") has run. 29 U. S. C. § 626(e)(1).[2] Thus, if the state makes a meaningful start on the resolution of a claim, the complainant can allow the state proceedings to run their course and wait long after the sixty day period has expired to commence litigation.

Significantly, this same state deferral period of sixty days is provided under Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(c) (which is phrased identically to Section 14(b)), before federal proceedings may be instituted. Respondent and the Solicitor General concede that timely filing with state authorities and the passing of sixty days is a prerequisite to the commencement of federal Title VII proceedings (Resp. Br. 12; S. G. Br. 14). Given that Congress considered sixty days to be a sufficiently long period of deferral for purposes of Title VII, there is no basis for the claim that this period does not provide sufficient time for state authorities to respond to ADEA charges.

II.

The Solicitor General claims that state filing should not be mandatory because a claimant can render the state proceedings a nullity by refusing to cooperate. However, the Solicitor does concede that the sixty day deferral period of Section 14(b) serves a valuable purpose for those ADEA claimants who, at the

2. The statute of limitations is three years in the case of willful violations.

time they commence the processing of their claims, desire to utilize the state enforcement mechanism. For these individuals, the Solicitor General claims that Section 14(b) "guards against a too-quick change of mind that could undermine the administrative process almost before it gets underway." (S. G. Br. 16.)

The sixty day period can also serve valuable purposes for "uncooperative" individuals. In these cases, the sixty day period guards against a precipitous resort to the federal courts. During this time, age discrimination claims may very well be resolved or claimants may change their minds about immediately instituting lawsuits and allow the state proceedings to run their course before suit is commenced.

However, a complainant's desire or lack of desire to cooperate with a statutorily prescribed procedure has no bearing on this case. To base the proper interpretation of a statute on whether an individual claimant desires to cooperate in utilizing the full range of administrative remedies available to him is totally contrary to the notion of exhaustion of administrative remedies. Nothing in Title VII requires a claimant to cooperate with a state agency, yet an unwillingness to cooperate does not excuse a Title VII claimant from filing a charge with a state agency as a jurisdictional prerequisite to instituting a lawsuit. Likewise, the fact that an individual's unwillingness to cooperate with state agency may defeat effective action is not a valid reason to conclude that Section 14(b) should not be read to require filing with a state agency. The legislative history of the ADEA makes clear that informal methods of conciliation should be stressed and suits filed only as a last resort (Pet. Br. 19). Interpreting Section 14(b) to be optional defeats this intent and encourages claimants not to cooperate with state agencies.

III.

The Solicitor General claims that interpreting Section 14(b) to require filing with state agencies is contrary to the philosophy

of the Fair Labor Standards Act ("FLSA"), 29 U. S. C. § 201 *et seq*. Specifically, the Solicitor argues that if Section 14(b) sets forth a mandatory prerequisite to lawsuits brought by aggrieved individuals, then the Secretary of Labor cannot bring suit unless the aggrieved party has sought relief from the appropriate state authority. In the view of the Solicitor, this means that the Secretary's ability to institute suit would be dependent upon private action or inaction, a result which the Solicitor claims is contrary to the policy expressed in the 1961 amendments to the FLSA (S. G. Br. 19-21).

The issue of whether Section 14(b) applies to lawsuits instituted by the Secretary of Labor is not before the Court.[3] However, regardless of whether Section 14(b) applies to the Secretary of Labor, the fact remains that under no circumstances will the Secretary be dependent on private action or inaction in order to commence ADEA litigation. If Section 14(b) does not apply to the Secretary of Labor, the state filing requirement obviously poses no problem since suit can be commenced without respect to whether resort has been had to the state agency. On the other hand, even if Section 14(b) is construed to set forth a prerequisite to lawsuits instituted by the Secretary, there is nothing in the ADEA which requires an aggrieved *individual* to file a timely charge with the State authority before the Secretary may commence litigation. Rather, the Secretary himself can notify the relevant State authority and thus eliminate any possibility that the suit will be barred by private inaction.[4]

3. The courts have split on this issue. *Compare Marshall* v. *Chamberlain Mfg. Corp.*, 443 F. Supp. 159 (M. D. Pa. 1977); *Usery* v. *West Essex General Hospital*, 15 FEP Cases 1130 (D. N. J. 1977) (Secretary of Labor must comply with Section 14(b)), *with Dunlop* v. *Crown Cork & Seal Co., Inc.*, 405 F. Supp. 774 (D. Md. 1976); *Cowlishaw* v. *Armstrong Rubber Co.*, 425 F. Supp. 902 (E. D. N. Y. 1977) (Section 14(b) does not apply to Secretary of Labor).

4. In some states, like the State of Iowa, the applicable age discrimination statute limits the filing of charges to aggrieved individuals and specified state officials. *See* Section 601 A.14(1), Code

(Footnote continued on next page.)

It should be noted that the Secretary of Labor's enforcement powers under the ADEA are not the same as under the Wage and Hour provisions of the FLSA. Prior to bringing an ADEA action, the Secretary must seek to conciliate the claim; there is no such requirement under the FLSA. *See* 29 U. S. C. § 626(b). And, should aggrieved individuals be unwilling to cooperate in conciliation or be unwilling to accept a settlement which the Secretary feels is reasonable, it is doubtful that the Secretary would institute any action. In short, the Secretary is unlikely to commence an action to seek recovery for an individual who is unwilling to cooperate with him.

In any event, the implications of interpreting Section 14(b) as setting forth a mandatory prerequisite upon litigation commenced by the Secretary of Labor is now largely an academic question. As of July 1, 1979, the Secretary of Labor will no longer have enforcement authority over the ADEA. Instead, this responsibility will be transferred to the Equal Employment Opportunity Commission ("EEOC"). *See Reorganization Plan No. 1 of 1978*, 43 Fed. Reg. 19,807 (May 9, 1978).[5]

In announcing the reorganization transferring enforcement authority for the ADEA to the EEOC, the President explained the reason for this change:

> There is now virtually complete overlap in the employers, labor organizations, and employment agencies covered by Title VII and the Age Discrimination in Employment Act. This overlap is burdensome to employers and confusing to victims of discrimination. *Message to the Congress Transmitting Reorganization Plan No. 1 of 1978. February 23,*

(Footnote continued from preceding page.)

of Iowa (App. 13). If these provisions are interpreted as preventing the Secretary of Labor from filing a charge, then, since the state does not provide a remedy, Section 14(b) expressly does not apply to the Secretary.

5. The President submitted this proposed reorganization to Congress on February 23, 1978 pursuant to 5 U. S. C. § 903(a). Congress did not disapprove the proposal during the next sixty days and, therefore, pursuant to 5 U. S. C. § 906, the reorganization became law.

1978, in Weekly Compilation of Presidential Documents, Vol. 14, No. 8, at 400 (February 27, 1978).

Interpreting Section 14(b) as being optional in nature frustrates the expressed intent of removing the confusion of overlapping laws and procedures. As noted above, in enforcing Title VII, the EEOC is required to give states a period of sixty days to resolve claims. The EEOC's enforcement of the ADEA should follow the same procedure. Otherwise, the confusion which the agency reorganization is designed to eliminate would continue since the EEOC would process all types of claims except age discrimination in one way and alleged ADEA violations in another. It makes no sense whatever to interpret the same statutory language being enforced by the same agency in two different ways.

IV.

Both Respondent and the Solicitor General place heavy reliance on remarks made by Congress in 1978 as being probative of Congressional intent when the ADEA was passed in 1967 (Resp. Br. 20-24; S. G. Br. 24-30). As noted in our original brief (Pet. Br. 24n), these remarks are not entitled to any weight in discerning the intent of the framers of the ADEA. This position is further supported by Respondent himself who, at two separate times in his brief, states:

> "The [1978 ADEA] Amendments are not relevant to the questions raised in this case." (Resp. Br. 3 n.1, 6 n.3)

Since none of the amendments were relevant to the questions raised in this case, the legislative history leading to these Amendments cannot be relevant.

Further, there is no legal or logical support for the Solicitor's bald assertion that Section 14(b) would have been amended to conform to the Committee's view but for the fact that Congress thought an amendment to be unnecessary (S. G. Br. 28). At the time Congress considered the amendments, the only courts of appeal which had issued opinions of this question had

held that Section 14(b) sets forth a mandatory prerequisite to civil suit. *See Goger* v. *H. K. Porter Co.,* 492 F. 2d 13 (3d Cir. 1974); *Curry* v. *Continental Airlines,* 513 F. 2d 691 (9th Cir. 1975).

As the Solicitor admits, Congress did amend the ADEA "to alter judicial decisions that in Congress' view were unfaithful to the 1967 Act." (S. G. Br. 28). Thus, in response to *United Air Lines* v. *McMann,* 434 U. S. 192 (1978), the ADEA's mandatory retirement provisions were changed. And, as a result of numerous court decisions concerning what was required to be a sufficient notice of intent to sue, *see, e.g., Dartt* v. *Shell Oil Co.,* 539 F. 2d 1256 (10th Cir. 1976), *aff'd by an equally divided Court,* 434 U. S. 99 (1977), Section 7(d) was amended and the timely filing of a charge of age discrimination with the Secretary of Labor was substituted for the notice of intent to sue as a prerequisite to civil suit. But the amendments did not respond to the existing precedent concerning Section 14(b). Congress' action in 1978 thus supports Petitioners' position and not Respondent.

V.

The Solicitor General attempts to distinguish Section 706(c) of Title VII from Section 14(b) of the ADEA on the basis of the existence of legislative history for Title VII which contains clear expressions of an intent for mandatory state deferral while no such legislative history exists with respect to the ADEA (S. G. Br. 12n.9, 21-23). As explained in our original brief (Pet. Br. 19-24), we believe that the legislative history of the ADEA does indicate clearly that state deferral was intended to be mandatory. However, even if the leigslative history of the ADEA is "not instructive" on this issue, as Respondent suggests (Resp. Br. 18), it does not follow that Congress intended state deferral to be optional. To the contrary, given the clear legislative history of Section 706(c), and the subsequent enactment of Section 14(b) in identical language, the burden is not on

petitioner to demonstrate that the two provisions should be interpreted in the same manner. Rather, it is incumbent upon Respondent and the Solicitor General to establish that, despite the identity of language, Congress clearly intended Section 14(b) to be interpreted differently from Section 706(c). This they have failed to do.

VI.

The Solicitor General suggests that because Congress, when adopting the ADEA in 1967, had a "dim view" of the effectiveness of state agencies in enforcing laws against age discrimination, it is unlikely that it intended to make recourse to these agencies mandatory (S. G. Br. 23). This ignores the fact that Congress dealt with this problem by expressly making Section 14(b) applicable only

> [i]n the case of alleged practices occurring in a state which has a law prohibiting age discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice . . . .

In short, Congress limited its deferral requirement to those states which had established procedures to enforce age discrimination charges. *See, e.g., Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N. D. Ill. 1976). There is no basis for concluding that Congress intended to give each claimant the option of deciding on the effectiveness of state enforcement mechanisms.[6]

VII.

Both Respondent and the Solicitor General argue that if state filing is held to be mandatory, the time limits of Section

6. There has been no suggestion at any time in this case that the Iowa State Civil Rights Commission does not possess sufficient authority to warrant the invocation of Section 14(b). In fact, the Iowa State Civil Rights Commission, like most other state agencies, handles age discrimination charges in the exact same fashion as claims of discrimination falling under Title VII (App. 9-16).

14(b) should be subject to the principle of equitable tolling (Resp. Br. 24-26; S. G. Br. 30-33). This argument is yet another attempt to subvert the purpose of Section 14(b) by eliminating the mandatory nature of compliance with specified time limits.

For this reason, this Court has rejected the concept of equitable tolling of time limits in the Title VII context. In *IUE, Local 790* v. *Robbins & Myers, Inc.*, 429 U. S. 229 (1976), the Court refused to apply equitable tolling to Title VII's time limits during the pendency of the grievance procedure under the applicable collective bargaining contract. The Court held (429 U. S. at 240):

> Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites with precision, *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47, Congress did not leave the courts the decision as to which delay might or might not be "slight".

This analysis applies with equal force here. Congress has set forth specific time limits in the ADEA. There is therefore no reason for the courts to engraft upon these time limits the doctrine of equitable tolling to allow claimants additional time beyond that specified in the statute.[7]

7. The Solicitor suggests that the Court remand this case to the district court to retain jurisdiction while respondent initiate proceedings with the Iowa State Civil Rights Commission. The Solicitor claims that the Court "has followed this path" in the Title VII context in *Crosslin* v. *Mountain States Telephone & Telegraph Co.*, 400 U. S. 1004 (1971) (S. G. Br. 32). However, in *Crosslin,* where the Solicitor suggested this position, the Court, in remanding the case to the district court, expressly stated (400 U. S. at 1004):

> By this remand this Court intimates no view as to the merits of the Solicitor General's position.

Shortly thereafter, this Court did state its view with respect to state deferral under Title VII. As Respondent concedes, in *Love* v. *Pullman Co.*, 404 U. S. 522 (1972), this Court held state filing to be mandatory in Title VII cases (Resp. Br. 12).

Acceptance of the tolling principle will serve only to undo the purpose of the ADEA's time limits which are designed to maximize expeditious settlement of age discrimination claims. If tolling is allowed, virtually every claimant who files a lawsuit would attempt to present some excuse for his failure to file in timely fashion, thus creating additional issues requiring factual hearings in the trial court. There is no legal basis for burdening the trial courts in this manner.

In sum, the ADEA's time limits are set forth in clear and unqualified terms. Equitable tolling would prolong the resolution of these claims and congest the courts with claimants who have not complied with the Act.[8]

8. Respondent states that the reason equitable tolling should be applied in this case is that he relied on misinformation from the Department of Labor and at the time of his filing there was no precedent from the Court of Appeals for the Eighth Circuit to guide him. However, when Respondent retired on January 31, 1976 and when he filed his notice of intent to sue with the Department of Labor on March 10, 1976, the only courts of appeal which had decided this issue had both held state filing to be mandatory. *See Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974); *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975). Further, Respondent's notice of intent to sue, which was filed at a time when he still could have filed a timely charge with the Iowa State Civil Rights Commission, was submitted by his attorney. In the Title VII context, the courts have rejected the principle of equitable tolling where plaintiff has retained counsel before the expiration of the filing period. *See Keyse* v. *California Texas Oil Corp.*, ... F. 2d ....., 18 FEP Cases 1397 (2d Cir. December 21, 1978).

CONCLUSION.

For all of the foregoing reasons, as well as for those reasons set forth in our original brief, we respectfully request the Court to reverse the decision of the Eighth Circuit Court of Appeals and remand this case to the district court with directions to dismiss this lawsuit.

Respectfully submitted,

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